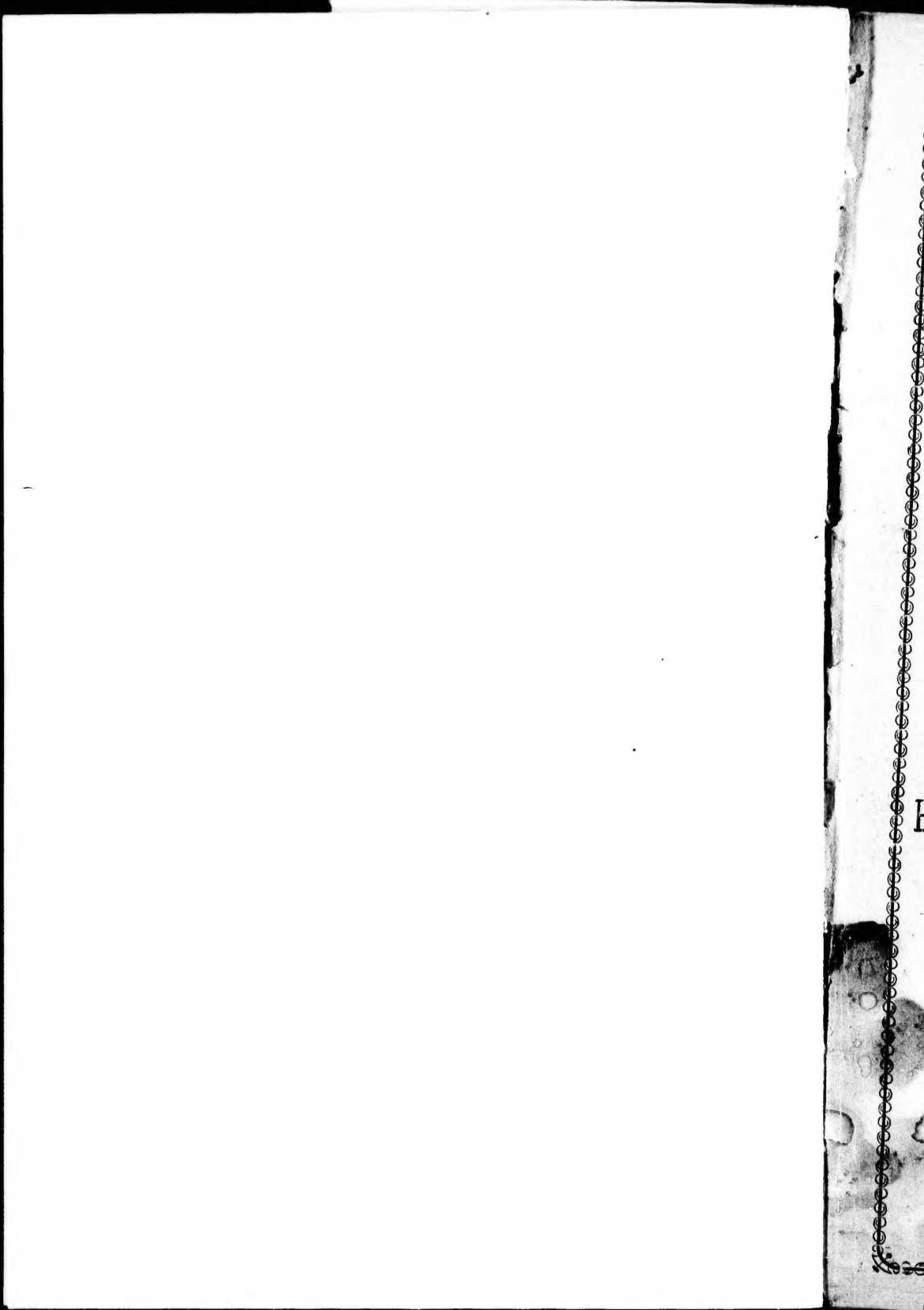




OPINIONS AND AWARD
OF
THE COMMISSIONERS,

UNDER THE TREATY OF JULY 1, 1863,

BETWEEN

GREAT BRITAIN AND THE UNITED STATES,

FOR THE

FINAL SETTLEMENT OF THE CLAIMS

OF THE

Hudson's Bay and Puget Sound Agricultural Companies,

PRONOUNCED, SEPTEMBER 10, 1869.

Montreal:

PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET.
1869.



OPINIONS AND AWARD
OF
THE COMMISSIONERS,

UNDER THE TREATY OF JULY 1, 1863,

BETWEEN

GREAT BRITAIN AND THE UNITED STATES,

FOR THE

FINAL SETTLEMENT OF THE CLAIMS

OF THE

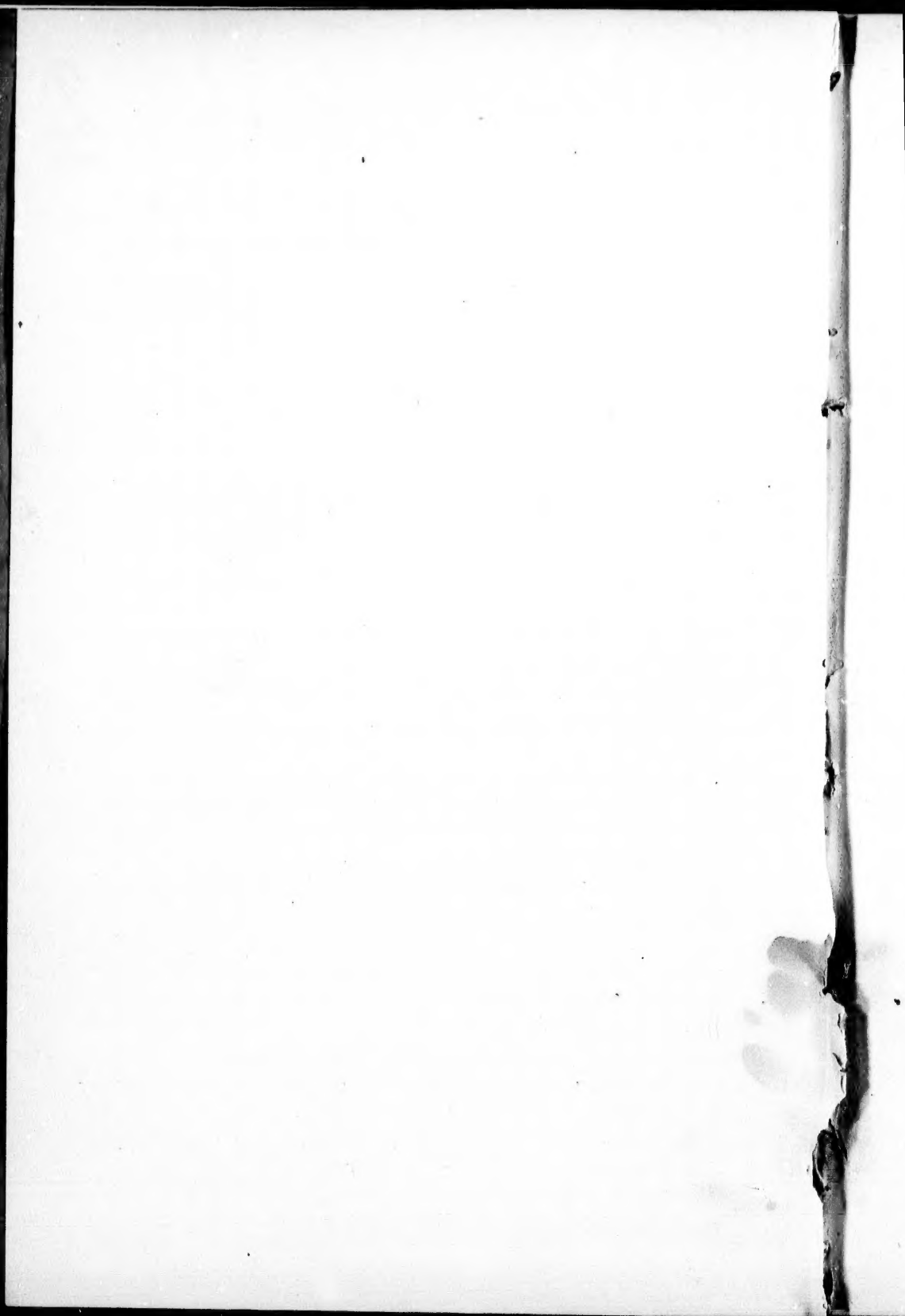
Hudson's Bay and Puget Sound Agricultural Companies,

PRONOUNCED, SEPTEMBER 10, 1869.

Montreal:

PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET.

1869.



British and American Joint Commission on the
Hudson's Bay and Puget Sound Agricultural
Companies' Claims against the United States.

OPINION OF THE HON. JOHN ROSE,

Commissioner on the part of Her Britannic Majesty.

In the matter of the Claim of the Hudson's Bay Company.

In entering upon the duty of considering the case of the Hudson's Bay Company, as presented to the Commissioners, it would appear to be unnecessary to review at length the numerous propositions stated in the memorial, and which are supported in argument by the Counsel for the Claimants, and controverted on the part of the United States. The Counsel for the Company has brought out every possible fact which could weigh in favor of the claim, and has supported his views by arguments singularly able and exhaustive. The reply on the part of the United States, in its turn, presents every aspect favourable to that Government so amply, that the Commissioners will best discharge their functions by expressing, with as little amplitude of language as possible, the opinions they have formed on those points which are necessary to guide them to a correct conclusion.

I do not consider it expedient, in the performance of the duties imposed on the Commissioners under the Treaty, that we should express a separate opinion on the many important and debatable propositions that have been submitted on either side, and supported with so much ability; or that we should attempt to place a distinct value on each item in the claim of the Company as it has been laid before us.

The respective Counsel have left nothing to be said either in the way of argument on the legal interpretation to be given to the language of the Treaty of 1846; or of comment on the very lengthy evidence bearing on the question of value.

I propose, therefore, to confine myself to a consideration of two points, viz :

1st.—What were the rights of the Hudson's Bay Company as understood by the Treaty of 1846 ? And what obligations did the United States of America thereby assume in respect of them ?

2nd.—What is now an adequate money consideration for these rights and claims ?

I.—The powers of the Hudson's Bay Company, as recognized by the Crown and the Parliament of Great Britain, for many years previous to the Treaty of 1846, were not merely those of a trading company. Motives of public policy on the part of Great Britain had prompted that Government to confer on the Company, in the uncivilized territory over which they extended their operations, authority of a judicial, political, and quasi-sovereign character. So far from being considered as intruders on the public domain, encouragement, in the shape of exclusive rights of trade, and otherwise, was held out to the Company as an inducement to carry their enterprise to regions into which they might extend, and be the representatives of British interests.

The public faith was, therefore, pledged towards the Company to secure just and friendly consideration for these interests, wherever the authority of England extended, and in whatever form it might properly be exercised. This duty has invariably been recognized in every negotiation of an international character by which their rights could subsidiarily be affected ; and from the prominence given to the position of the Company in the Treaty of 1846, it is evident that the duty of providing adequately for their protection was considered a paramount one by the Government of Great Britain.

The rights and interests of the Company could hardly be more comprehensively defined than by the expression "possessory rights." They exercised no rights which they had not acquired, and which they did not, long before the date of the Treaty, possess, with the knowledge, and by the sanction, of the Crown. I am unable to coincide with the argument of the Counsel of the United States, that the expression "possessory rights" imported only such fixed improvements on land as a tenant at sufferance might claim. I am, on the contrary, impelled to adopt, as the legitimate interpretation, the general view urged by the Claimants: that it comprehended all things, corporeal

and incorporeal, of an appreciable character, of which the Company had the enjoyment.

It is urged, however, that during the joint occupation preceding the Treaty of 1846, the United States were sovereign, *de jure*, of the country over which the Hudson's Bay Company's operations extended; that the convention of 1818 merely suspended the exercise of such sovereignty; that Great Britain could not confer, nor could the Hudson's Bay Company acquire any rights in the interim, except those of ordinary occupants; and that the Treaty of 1846, imposed no new obligation on the United States, beyond what its laws extended to other persons in the unauthorized possession of its public lands.

The convention of 1818 cannot, in my opinion, be construed to recognize, in either party, an exclusive right to the territory, but, on the contrary, only to declare what the previous circumstances in relation to the country, and the concurrent statement of the two governments, imported: that the title of neither nation was clear. I do not, however, consider it necessary to found an argument on this, because the language of the Treaty of 1846 seems to me clearly to imply on the part of the United States, an acknowledgment of, and to concede a rightful possession and property in, the Hudson's Bay Company, of the character I have defined, which the Government of the United States assumed the important and substantial obligation of respecting.

This obligation their Counsel contends was fulfilled if the United States Government, by itself or its officers, refrained from direct violation of such rights as the Treaty referred to, and permitted the Company to exercise the judicial remedies customary to the country.

The Claimants contend for a broader view of the duty, and that under the peculiar circumstances of the country, and the position in which the Hudson's Bay Company was placed, the attitude taken by the Government and its officers in regard to the rights of the Company under the Treaty, and the fact that trespass and violation in every form were practised, shewed a substantial failure to respect, and accord that reasonable measure of protection to their rights, which, in a Treaty stipulation of this character, and with reference to rights of so peculiar a nature, one nation has the right to look for at the hands of another.

It would be productive of no practical benefit to attempt, by general rules, to define the exact measure of duty devolving on the United States in each particular case where a breach of the Treaty stipulation is complained of.

It was obvious at the time of the Treaty, that the position of a foreign corporation, claiming to exercise almost every right not incompatible with sovereignty, in the territory of the United States, was an anomalous one, and one which would, as between any nations, and even in a maturer state of society, have given rise to innumerable difficulties that could neither be foreseen nor guarded against.

Those difficulties were aggravated in the present case by the two-fold exercise of authority by the State and the Federal Governments ; by the rude and immature condition of society ; and by the spirit of individual liberty, bordering on lawlessness, which exists in a new country. It is hardly possible to interpret the precise obligation which the words of the Treaty import, without reference to the practical difficulties which subsequently arose, and which could not then but have been anticipated, and must be presumed to have been in the minds of the high contracting parties. Keeping these considerations in view, I regard the obligations of the United States under the Treaty, to mean, that, cognizant of this state of things, they undertook the correspondingly extensive duty of seeing that the Hudson's Bay Company should not suffer from them, but that the Company would be maintained in the exercise of their rights and property as fully and amply as they had been previous to the Treaty.

The Counsel on both sides have presented every possible aspect in which the words of the Treaty might be interpreted, and they have exhibited great learning in their citation of authorities, and acumen in the reasoning applicable to them. Having given the most anxious and repeated consideration to their respective views, I feel it impossible to escape from the conclusion which I have now indicated, as to the character of the rights which the Company possessed, and the extent of obligation assumed by the United States in respect of them.

Before entering on a consideration of the second branch of the case, it is proper to notice the objection taken as to the duration of the Company's rights. It is contended on the part of the United States that any rights which the Company might have had were

limited as to time, by the licenses of exclusive trade granted by Great Britain, which finally expired in the year 1859, and that after that day the Company's possession was without any color of right whatever.

I cannot acquiesce in this proposition. The licenses, in my opinion, had for object to prevent the danger to the peace of the country, and the well-being of the Indians, which might have arisen from the competition of rival traders within the territory. The rights which were recognized in the Company, as national pioneers, were both antecedent to, and independent of, these licenses.

Their occupation of the lands, their trading, their posts and other possessions, were not dependent on the licenses, which only super-added the privilege of exclusiveness in favor of the Company, against all but the citizens of the United States. If, at the expiration of the licenses, the British Government had not seen fit to renew them, the rights, property, and interests of the Company, would not have been impaired, but must have continued to be respected by the Crown on the grounds of natural justice and equity, although the Company would have been deprived of the power of excluding other British subjects from trading in the country.

Such is the aspect in which, according to my judgment, the license of trade ought properly to be regarded.

II.—The duty of ascertaining the adequate money consideration to be paid to the Hudson's Bay Company by the United States is one of extreme difficulty,—especially if the determination of the sum is to depend on the legal appreciation of the evidence which has been submitted to the Commissioners.

The claim is presented to the Commissioners under certain specified heads of demand, viz :—

1st.—The value of the various posts of the Company.

2nd.—The value of its trade.

3rd.—The value of the right of navigating the Columbia River.

4th.—The loss and damage occasioned by the acts of the United States.

The means which have been afforded the Commissioners of arriving at a conclusion on these points are:—

1st.—The opinions of numerous witnesses who have been examined on both sides.

2nd.—The offers that have been made, as well on the part of

the United States as on the part of the Hudson's Bay Company, at various times since the date of the Treaty.

3rd.—Other documentary evidence, and a variety of circumstances connected with the claim, bearing on the question of value, which have taken place since 1846.

With reference to the item of claim founded on the right of navigating the Columbia River (No. 3) the Treaty under which the Commissioners exercise jurisdiction, empowers them to examine and decide on all claims arising out of the 3rd and 4th Articles of the Treaty of June, 1846.

These Articles relate to the possessory rights of the Hudson's Bay Company, and to the lands of the Puget Sound Agricultural Company only; and the stipulations relating to the navigation of the Columbia River are to be found in another, the 2nd Article of the Treaty of 1846.

No reference is made to the 2nd article of the Oregon Treaty in that under which the Commissioners hold jurisdiction. It would, therefore, appear that their functions are limited to a consideration of those claims only which arise out of the provisions of the 3rd and 4th Articles.

The Counsel for the Claimants, however, contends, that even assuming the alternative that the right cannot now be dealt with "as a distinct and independent ground of claim under the 2nd Article of the Treaty, it is nevertheless a *possessory right*, giving an enhanced value to all the other possessions of the Company."

I have given my anxious consideration to the aspect of the case with reference to the Columbia River, which is thus presented, and am compelled to adopt the conclusion that dealing with any right of navigation secured by the 2nd Article of the Oregon Treaty must be considered as *ultra vires* of the Commissioners.

I, therefore, proceed to discuss the remaining three items of claim presented to the Commissioners, viz: the value of the Company's posts and lands, the value of the trade, and the loss and damage resulting from the acts which have been committed.

It is but due to the Counsel engaged, to say, that the manner in which the extremely voluminous evidence has been analyzed, and the tables and indices which have been prepared, have afforded means of reference to the Commissioners which have greatly facilitated their labor, and enabled them to appreciate the testimony

under the different headings, in a more satisfactory way than it would otherwise have been possible to do. The difficulty of forming a correct judgment, and meeting the real justice of the case, is not, however, diminished.

The evidence of the Claimants, if it stood alone, might be appealed to, to sustain an award of more than a million of dollars; while the weight of the evidence adduced by the United States would reduce the claim to a very insignificant sum.

Offers on the part of certain functionaries of the United States were made at one time to pay \$1,000,000 for the rights of the two Companies, including the navigation of the Columbia River, as expressed in the draft of a convention prepared by Mr. Webster in 1852; while at another time, in 1860, the Company, through Lord Lyons, agreed to accept \$500,000 as in full of their demands.

During the negotiations, various intermediate sums were named as a proper indemnity which it would be just to pay. I cannot regard these negotiations as any evidence of the appreciation by the Company of the true value of their rights. The Company then had well grounded apprehension that they might receive nothing. Congress had declined to vote any sum whatever. The Company no doubt feared that the Treaty stipulation could only be enforced at the risk of involving national strife. They knew that private interests must succumb in the presence of, and to avert so vast a danger, and were ready to accept anything which the British Government might indicate its readiness to stand on. I am disposed, therefore, to regard the wide range of these negotiations, and the diversity in the sums offered and agreed to be accepted, chiefly as indicative of the desire of the executive Governments of both countries to arrive at some adjustment of a national controversy; and as evidence of the extreme difficulty of forming an accurate estimate of the real value of the rights which were in dispute.

If we recur to the opinion of the witnesses as to the value of the posts and land, and of the trade, those of the Claimants would fairly, and after making very ample allowance for over estimate, justify an award considerably in excess of the lowest sum which the Company was at one time prepared to accept; while in the opinion of the witnesses for the United States, those items of claim are hardly of any appreciable value. It cannot be denied but that during the interval which elapsed between

the date of the Oregon Treaty, and their final abandonment of the country, the Company suffered a series of wrongs in disregard of the Treaty stipulations, for which indemnity is properly due to them ; but it would serve no good purpose to refer in detail to these acts of aggression, or to the obstacles which from the first have been interposed in the Company's way.

While I hold these general views with respect to the rights of the Claimants, and to the measure of indemnity they ought to receive, I am not indifferent to the great importance of arriving at a conclusion in reference to the amount to be awarded, in which both Commissioners may concur.

It is obvious that in a case of this nature, where there is ground for much honest difference of opinion, both as to the law and facts of the controversy, each Commissioner must be prepared to make some concession in the views he holds, if a common judgment is to be reached. There is no rule by which the testimony can be appreciated, to warrant the conclusion that a positive sum—no more and no less—is made out in proof. Upwards of 170 witnesses from every part of the continent, and in every possible sphere of life, have been examined in the two claims before us ; while the evidence both documentary and other, with the arguments upon it, cover more than 3,500 pages of printed matter. The number and character of these witnesses ; their means of information ; their disposition to view the claims favourably or the reverse ; the grounds they assign in support of their opinions ; the elements of value on which each relies in support of his opinion, have all to be weighed and often with reference to facts, themselves controverted. By no process of reasoning can I satisfy my mind that I ought to fix on a particular sum, above or below which, within a reasonable range, there would be error in going. I have endeavoured to form some estimate of the mean sum which the several opinions of the witnesses named give ; but this attempt is equally impracticable. The items in controversy are so numerous, and so varied in their character ; the range over which the enquiry extends is so wide ; and the nature of the interests themselves is such, that anything like precision as to value is impossible. In fine, probably no two minds could be found whose opinions on the evidence would be likely even to approximate to the same conclusion ; and an unbiassed

appreciation of it cannot but lead to the conviction, that within a wide range of value there is room for possible error of judgment.

My individual opinion would have been in favor of awarding a considerably larger sum to the Claimants, than that in which my colleague is willing to concur. Yet the inherent difficulties of the case, to some of which I have adverted, would seem to impose on one seeking to perform his judicial functions with impartiality, and to accomplish effectual results, the duty of not pushing to the limit of irreconcilable difference, the opinion he holds ; but on the contrary of modifying his own views to some extent within the range to which the testimony may reasonably be held to apply, where he finds an honest opinion, equally strong, adverse to his.

After much anxious and lengthy comparison of opinions with my colleague, and on the fullest and most careful consideration I have been able to give, I believe it to be my duty to acquiesce in the sum of Four Hundred and Fifty Thousand Dollars in gold, as an adequate money consideration to be paid to the Hudson's Bay Company for the transfer of the rights and claims to the Government of the United States, specified in the Treaty of the 1st July, 1863, and do award that sum to be paid accordingly in terms of the said Treaty.

JOHN ROSE,

Commissioner on the part of Her Majesty.

Washington, September 10th, 1869.

In the matter of the Claim of the Puget Sound Agricultural Company.

In considering the claims of the Puget Sound Agricultural Company, the same observations of a preliminary nature, which are made in the opinion expressed in the case of the Hudson's Bay Company, will equally apply. The arguments on both sides in that case, may be read in connection with those offered in the present. The same tribute must be paid to the clear, exhaustive, and able manner in which the case of the Claimants has been presented in argument; to the lucid arrangement of the testimony; and to the facility which has thus been afforded the Commissioners for a right apprehension of its merits.

The duties of the Counsel for the United States have been performed with equal ability, and it may, without exaggeration, be stated, that on neither side has a single point been unnoticed which could in the one case support, or in the other, tend to destroy, the merits of the demand.

The 4th article of the Oregon Treaty provides, that the farms, lands, and other property of every description belonging to the Company, on the north side of the Columbia River, should be confirmed to them; but that "in case the situation of those farms and
"lands should be considered by the United States to be of public
"and political importance, and the United States Government
"should signify a desire to obtain possession of the whole or any
"part thereof, the property so required shall be transferred to the
"said Government at a proper valuation to be agreed upon between
"the parties."

The two points which now present themselves for adjudication seem to me to be:

I.—Of what do the farms, lands, and other property consist?

II.—What is an adequate money consideration for their transfer?

The Claimants aver the property to consist of:—

1st.—A tract at Nisqually containing about 167,040 acres with buildings and improvements;

2nd.—The lands at the Cowlitz River containing about 3,572 acres with buildings and improvements;

3rd.—Live stock driven away or destroyed, and other personal property for the loss of which they claim compensation.

The Counsel for the United States, however, takes issue on the existence of the legal status of the Company, averring it to be a fraudulent and illegal offshoot of the Hudson's Bay Company; denies that the Treaty acknowledges any property whatever in the Company, confirming only to it such property as it may prove lawfully belonged to it; insists that the proof of lawful ownership is in no way dispensed with; contends that if any compensation at all is due it must be confined to improvements only, and to those on lands actually enclosed; that no claim can be preferred under the Treaty for loss of live stock or other personal property; but that if any loss in respect of these had been sustained, the Company could only have recourse to the Courts of law, like other inhabitants of the Territory of Washington.

I have read and considered with much care the ingenious arguments, and the numerous authorities offered to sustain these several propositions. I fail to be convinced of the legal incapacity of the Company to acquire property. I can see no ground whatever for attributing to it any fraudulent or even questionable character. I consider that the treaty of 1846, as well as that of 1863, conceded beyond all doubt, both in spirit and in explicit terms, the right of the Company to possess its lands and property north of the Columbia River.

The only questions involving serious difficulty or embarrassment in my mind are to ascertain the extent and boundaries of the farms, lands, and other property of the Company, and to decide as to what is the proper valuation, or adequate money consideration, to be paid on their transfer to the United States.

The sources to which the Commissioners have to look for guidance, in endeavouring to arrive at a just conclusion on these points, are substantially the same as those to which reference has been made in the case of the Hudson's Bay Company.

The same difficulties attach to an intelligent appreciation of the evidence offered in this case as in that, whether we refer to the opinions and assertions of witnesses; to the weight to be attached to the offers of compromise; or to the several facts (such as the assessed value for taxation by the local authorities,

of the property) enumerated in the evidence, as bearing both on the question of extent and value.

The position of the Puget Sound Company under the Treaty of 1846 was equally anomalous and unsatisfactory with that of the Hudson's Bay Company. It had in addition to wait for the signification of a desire on the part of the United States to acquire its lands and property; and it was, in the mean time, subject to the inroads of settlers claiming under the Local law.

It was exposed to the same recurring acts of aggression, against which it was difficult to obtain protection from the local tribunals; and the testimony produced by the Claimants evinces a state of popular feeling within the Territory, against which it seemed, from the outset, hopeless for the Company to contend. There is much force in the argument, that the United States standing in the double relation of Sovereign of the newly acquired Territory and purchaser, at option, of the land, ought not to have the advantage of any depreciation consequent on its own acts. While giving due weight to this aspect of the case, it would perhaps be of little avail, practically, to refer in detail to the difficulties which beset the Company from the year 1846 downwards, and which are so pointedly enumerated in the evidence before the Commissioners. I propose to content myself with stating, in general terms, the views I have formed touching the character and extent of the property for which indemnity ought to be given, and what I think has been shown to be the proper valuation and measure of indemnity in respect of it.

I have already stated it to be my opinion that the title was recognized by the high contracting parties to be a right of ownership in the Company, and that the use of the word "belonging" did not, as contended for by the United States, imply a restriction to such property as the Company could prove a legal title to, or ownership in. The extent of its possessions, however, was left undecided, and that question now presents considerable difficulty in forming a correct judgment with reference to it.

The Company carried on the work, not only of farming, but of raising sheep and cattle. That business required the occupation and use of large tracts for pasturage; and this state of things was known at the time of the Treaty of 1846. That Treaty makes use of language which is manifestly intended to include the lands, and

all the property of every description which the Company used or possessed ; and I cannot accept the modified interpretation contended for by the United States, that it meant to confirm only what the Company could prove a legal ownership in ; or that in any case its claim must be confined to such land as was actually enclosed. The Company had no different title to the lands within enclosures, from what they had to those over which their pastoral occupations extended. Both rested on the fact of possession and use. Enclosures were unnecessary either for the convenience of the Company's business, or as evidence of possession in them, for there were no other occupants in the country. They alone possessed, and the segregation of what they possessed by defined boundaries, from other tracts, was a form wholly unsuited to the primitive condition of the territory. It is evident that in the contemplation of both parties, this property was understood to be extensive, for it is anticipated in the language of the Treaty that they might be of public and political importance. I am, therefore, of opinion that the estimate of value should extend to, and be held to include, all the lands in the geographical tract at Nisqually, which the Company used for its agricultural and pastoral purposes.

The farm and establishment at Cowlitz offer less difficulty as to the question of boundary and extent ; and I think the Claimants have made out a satisfactory case to the possession of about 3000 acres there. y

It will be seen from the construction which in my judgment should be given to the Treaty, with reference to the extent of the Company's property for which indemnity is rightly due, viz : that it comprehends all that the Company possessed for agricultural, as well as for pasturage purposes ; that applying the evidence of record to those principles of construction, the measure of indemnity should be a large one.

I make due allowance for exaggeration of opinion on the one side, and undue disparagement on the other ; and I appreciate the objections which attach to adopting, as an absolute criterion of value, the assessment by the local authorities, of the Company's property at Nisqually.

The intrinsic difficulties in the way of a just estimation, after a close and rigid scrutiny of the evidence, are very great, even if

there were no controversy on the construction of the Treaty, as to the items to which the evidence should apply.

A comparison of views by the Commissioners has served but to show how great the difference of judgment may be, on the conflicting and varied state of facts presented, even when no other influence than that of a single-minded desire to appreciate it intelligently and impartially inspires them.

The rule which they have thought it their duty to be guided by, has been to form what the separate judgment of each pointed at, as a fair estimate of value; and then, after discussion, that each should acquiesce in such a reasonable modification of opinion, within a certain range of value, as might be necessary to arrive at a common conclusion. This would seem to be the only alternative open, but that of remitting the case to the single judgment of the umpire.

While, therefore, according to my individual judgment, the measure of compensation ought to be sensibly larger than that which is arrived at, I have, on the whole, though with some misgivings, felt it the part of duty, to acquiesce in a modified amount, in order that the united award of the two Commissioners might set at rest a controversy, which has been already prolonged to an extent seriously injurious to the interests affected by it. I, therefore, decide, that the adequate money consideration to be paid by the United States of America to the Puget Sound Agricultural Company for the transfer of their rights and claims to the United States, is Two Hundred Thousand Dollars in gold, and do accordingly award, that that sum shall be paid, according to the terms of the Treaty.

JOHN ROSE, *

Commissioner on the part of Her Majesty.

Washington, September 10th, 1869.

OPINION OF THE HON. A. S. JOHNSON,

Commissioner on the part of the United States.

The Treaty of July 1, 1863, between the United States and Great Britain, from which we derive our authority as Commissioners, furnishes us with the rule of our action, in the declaration required to be made by us before proceeding to any business. The terms of that declaration are, that we will impartially and carefully examine, and decide, to the best of our judgment and according to justice and equity, without fear, favor, or affection to our own country, all the matters referred to us for our decision.

These matters are defined in the first article of the Treaty. In this article, after a brief recital of the third and fourth articles of the Oregon Treaty of June 15, 1846, and a declaration that it is desirable that all questions between the United States authorities on the one hand, and the Hudson's Bay and Puget's Sound Agricultural Companies on the other, with respect to the possessory rights and claims of those Companies, and of any other British subjects in Oregon and Washington Territory, should be settled by the transfer of those rights and claims to the Government of the United States for an adequate money consideration, it is agreed that Commissioners shall be appointed for the purpose of examining and deciding upon all claims arising out of the provisions of the above quoted articles of the Oregon Treaty.

The Oregon Treaty recites it to be desirable for the future welfare of both countries, that the state of doubt and uncertainty, which had hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated, by an amicable compromise of the rights mutually asserted by the two parties over the said territory. It then in its first article, fixes a line of boundary between the territories of the United States and those of Her Britannic Majesty. By the second article, the navigation of the great northern branch of the Columbia River to its junction with the main stream, and thence to the ocean, with

all the usual portages, is declared to be free and open to the Hudson's Bay Company, and to all British subjects trading with the same.

The third and fourth articles, which are directly in question are in these words :

ARTICLE 3.

In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this Treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected.

ARTICLE 4.

The farms, lands, and other property of every description, belonging to the Puget's Sound Agricultural Company, on the north side of the Columbia River, shall be confirmed to the said Company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said Government, at a proper valuation, to be agreed upon between the parties.

These are the Treaty provisions which mainly control the rights and claims upon which we are to pronounce. There are, however, earlier arrangements between the two Governments respecting the Northwest Territory which ought to be kept in view.

By the convention of October 20, 1818, article 3, it was agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks and the navigation of all rivers within the same, be free and open for the term of ten years, from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers ; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may

have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves.

Subsequently on the 6th of August, 1827, by another convention, the third article of that of 1818 was indefinitely extended and continued in force, subject, however, to be abrogated on twelve months' notice by either party to the other. And it was further declared that neither convention should be construed to impair, or in any manner affect the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains.

In connection with the negotiation of the convention just mentioned, it is proper to notice the British statement annexed to the protocol of the sixth conference, held at London, December 16, 1826, between Messrs. Huskisson and Addington, the British Commissioners, and Mr. Gallatin, the minister plenipotentiary of the United States. It is mainly a discussion of the grounds of claim urged by the United States to the exclusive sovereignty of the territory, and so far is not material to be considered. It contains also a statement of the views maintained by the British Government in respect to the joint occupation of the territory, which, in my judgment, have a bearing on the questions before us.

It commences by stating that, in proposing to renew the arrangement for joint occupation, for a further term of years, the British Government regrets it has been found impossible, in the present negotiation, to agree upon a line of boundary which should separate those parts of the territory, which might thenceforward be occupied or settled by the subjects of Great Britain, from the parts which would remain open to occupancy and settlement by the United States.

After a discussion of the claims of the two countries, this statement is made: "In the interior of the territory in question, the subjects of Great Britain have had for many years numerous settlements and trading posts: several of these posts on the tributary streams of the Columbia, several on the Columbia itself, some to the northward, and others to the southward of that river." "It only remains for Great Britain to maintain and uphold the qualified

rights which she now possesses over the whole of the territory in question. These rights are recorded and defined in the convention of Nootka. They embrace the right to navigate the waters of those countries, the right to settle in and over any part of them, and the right freely to trade with the inhabitants and occupiers of the same. These rights have been peaceably exercised ever since the date of that convention; that is for a period of nearly forty years. Under that convention valuable British interests have grown up in those countries." "To the interests and establishments which British industry and enterprise have created, Great Britain owes protection. That protection will be given both as regards settlement and freedom of trade and navigation, with every attention not to infringe the co-ordinate rights of the United States."

Even prior to the making of the first convention of joint occupation, posts were held in the country in question, both by the Northwest Company and the Hudson's Bay Company. These posts came subsequently by agreement between the two Companies, into the sole possession of the Hudson's Bay Company. These establishments had been greatly increased in number and value, before the period of the renewal of the convention for joint occupation. At the time of the making of the Oregon Treaty, they had been still further extended and improved, so that the actual possessions of the Company and of the Puget's Sound Agricultural Company embraced a very large and valuable property interest—in fact the most important and valuable of the civilised establishments within that territory. This result had been facilitated by the Act of Parliament of 1821, which authorised the Crown to grant for a period not exceeding 21 years the exclusive privilege of trading with the Indians: exclusive as against all British subjects, but not attempting any interference with the rights of American citizens. In pursuance of this Act, a grant was made of the exclusive trade with the Indians, which became finally vested in the Hudson's Bay Company, and which by renewal was in force in 1846, when the Oregon Treaty was made, and by its terms was to expire in 1859.

In addition to this right of exclusive trade with the Indians, various powers and duties were, in pursuance of the Act of Parliament referred to, conferred upon the Hudson's Bay Company, having reference to an administration of justice and government. It thereby became a quasi-governmental agency of the British

Government over its subjects within that territory. Under these favoring circumstances, the Company increased largely in wealth and possessions, and was in great prosperity at the conclusion of the Treaty of 1846.

It will be observed, that not only were the rights of American citizens not interfered with by the Act of Parliament, but no right was denied within the territory to any British subject, save that of trading with the Indians. The whole effect in this regard, therefore, of the Act of Parliament and the grants made in pursuance of it, was to close the trade with the Indians, against all British subjects in favor of the Hudson's Bay Company. So far as we have been made aware, there was no other legislation, by either Government restricting its citizens or subjects from the full and free enjoyment of all the rights embraced in the mutual declaration of the two Governments, that the territory should be free and open to the subjects and citizens of each. The declaration contains no limit, upon the nature of the use to be made of the territory by those who should resort to it, and in the absence of any such expressed limit, the terms employed should receive a large and beneficial construction. They who went into the territory were, I think, at liberty to make such use of it, as it was found to be capable of, for trade and hunting if it were fit for nothing better ; for civilisation and settlement, if that were found to be possible.

The main purpose and object of the reservation which accompanied the convention of joint occupation and its renewal, was to save the question of ultimate sovereignty from prejudice. And although the legal title to the land may be necessarily included in the idea of sovereignty, so that, notwithstanding settlement and improvement, the settler must be deemed to hold subject to the final adjustment of the question of sovereign dominion, it is not too much to say, that those who first appropriated the lands to the purposes and uses of civilized life, would have acquired an equitable claim to consideration, from whichever party should in the end be found to be legally the sovereign. Certainly, each Government hoped by emigration and settlement to strengthen itself in the territory, with a view to the final adjustment of the question which was open between them. And I think it can scarcely be supposed, that either Government ever expected, that in a settlement of the disputed sovereignty by negotiation, the other would be willing to

abandon its citizens or subjects, as the case might be, without stipulating for appropriate protection.

The Hudson's Bay Company had, in addition, peculiar claims upon the protection of the British government, under whose sanction its establishments were formed. For while it was carrying on trade, doubtless for its own benefit, it was also the sole governmental agency of Great Britain in the vast region in question. Its position of actual possession in the territory, afforded the strongest ground for the expectation on the part of that Government of maintaining its hold upon the territory, at least to the Columbia River.

Under these circumstances I think the British Government was bound to afford it protection, and that the statement of the British negotiators in 1827, as to the purpose of their Government in that regard, does not go beyond the measure of obligation due from it to the Company.

Nor would the measure of that obligation have been less, if the territory had in the end fallen to Great Britain. The possession of the Company in the territory, acquired with the assent and sanction of the Government, and over which they had first begun to extend the influences of civilisation, could not have been taken from them, without a violation of natural justice. It is true that for the purposes of civil government, and the convenient devolution of property, the title to land is deemed to be derived from the sovereign, but its more natural foundation is upon the enterprise and labor of those who first subject it to cultivation and civilized use. So strong is the conviction of the justice of this view, in this country at least, that the rights of original settlers have, I think, never been disregarded, and the laws have, from time to time, been modified and moulded so as to protect this equitable right, even where it had its inception without the sanction of law. The same view is, in my judgment, to be applied to the possessions of the Hudson's Bay Company in this territory, with respect to the British Government.

They were not held by grant from the Crown, but they were held under circumstances which bound that Government to maintain the Company in those possessions.

Having thus stated as briefly as I am able, the condition of the Hudson's Bay Company at the time of the Oregon Treaty, and its relations with the Government of Great Britain, and the rights and

duties growing out of those relations, I proceed to consider the language of the Treaty, in its application to these subjects.

The preamble, in substance, declares that the Treaty is an amicable compromise of the rights mutually asserted over the territory, and made to put an end to a state of doubt and uncertainty, respecting the sovereignty and government over it. This being the declaration of both Governments, neither is at liberty in my judgment to go behind it, or to take ground in the construction of the provisions of the Treaty, founded on the assertion of a clear previous right. The Government of the United States, during the negotiations which preceded the Treaty, asserted a right to the whole territory. This position was abandoned by the acceptance of the Treaty. The territory is now held as the result of an amicable compromise of conflicting rights, in which there is no concession by either party, of any previous invasion of the rights of the other. Upon such an amicable compromise, it stood upon natural justice, that protection should be extended to the subjects or citizens of either Government, found to be established within the line appropriated to the other, and that the measure of that protection should be equal to the rights of every sort, which existed under the original government.

We are not, however, left to determine what would be the rights and duties of the parties, were the treaty silent upon the subject. They have seen fit to declare, by the third article of the Treaty, that the possessory rights of the Hudson's Bay Company by name, as well as those of all British subjects, having certain qualifications, should be respected.

The plain object of this provision, is to secure protection for the parties, under the newly acknowledged sovereignty of the United States. It should be construed with a view to the furtherance of that end, and so as to secure ample and complete protection to the rights which were its object.

The stipulation for protection is the language of both Governments, and therefore whatever possessory rights the Hudson's Bay Company had against either of them, whatever their nature or completeness, whether they were of perfect or only of imperfect obligation, capable of assertion through the judicial power, or requiring legislative action to perfect them, they are secured and established in right. And the Commissioners, being empowered to deal with

these questions according to justice and equity, can dispose of them, unembarrassed by considerations which might arrest the action of the ordinary judicial tribunals, and require a resort to the power of legislation. In my judgment then, as well for the reasons I have stated, as for others ably set forth in the argument of the Claimants, the possessory rights of the Hudson's Bay Company included all their rights, save those which related solely to government and administration.

Upon the duration of their enjoyment of those rights, the language of the treaty imposes no limit. They did not derive them from the exclusive license to trade with the Indians. The force of that license was the exclusion of others. Had it failed of renewal before the treaty, none of their rights would have fallen with it, save those of government and administration. They would have remained in possession of the lands they occupied, of the right of trade in general, and of the right to trade with the Indians, in common with all other British subjects and American citizens. And if the Government of Great Britain had seen fit to assert its legal ownership of the land possessed by the Company, it could not have done so consistently with equity and justice, without providing compensation.

All these rights were preserved to the Company, in my judgment, by the Treaty ; and the corresponding obligations were assumed by the United States.

Upon the question whether these rights have been respected, as the Treaty required, I do not propose to go into detail. No one who reads the history of the affairs of the Company, as related in the evidence, from the time of the Treaty to the time when they by virtual compulsion abandoned their establishments south of the American line, can fail to feel that such respect, as was in fact received, was scarcely commensurate with the extent of the obligations of the Government of the United States. This result was due, in my judgment, in great part to an erroneous view by the Government of the United States, of the extent of its obligations. It seems to have assumed, that it had no duty in the premises, but to leave the Company to the assertion of its rights, in the ordinary tribunals of the country ; and that it was at liberty to confine them to such rights as were thus capable of assertion ; and it finally arrived at the conclusion, that all the rights of the Company terminated with the expiration of the period named in its exclusive

license to trade. I do not find that from the time of the Treaty, to the present, the Company has voluntarily abandoned any part of its possessions or rights, and I cannot, therefore, on any such ground, diminish at all the measure of redress, to which I conceive the Company to be entitled.

Coming then, in the last place, to the question of the adequate money consideration spoken of by the Treaty, for the transfer to the United States, of all the rights and claims of the Hudson's Bay Company, under the third article, I encounter serious embarrassments. The testimony, which is exceedingly voluminous, and drawn on each side from every source that could throw light upon the subject, and which has been presented to us in all its aspects with masterly ability, gives a very great range of values, as applicable to the possessions of the Company. From a mere trifle on the one side, all the way to the enormous sum demanded in the Claimants' memorial, on the other, almost any sum could be supported by testimony, free from criticism, affecting either the fidelity or intelligence of the witnesses. Under these circumstances, I have endeavoured, as well as I could, to arrive at an amount, which should do injustice to neither party. Upon comparing my views with those of my colleague, after we had each separately deliberated upon the evidence, I found that we differed in amounts, and in the directions in which our views might naturally be expected to incline.

In every inquiry in respect to such a subject as value, an uncertainty necessarily exists as to the correctness of any particular determination. When upon examination, however careful, a value is set, it is not certain that the decision is free from error, to a greater or less extent, and the limit of this possible or probable error will be greater or less, according to the number and relative certainty of the several elements, which enter into the calculation. Taking this view of the difference between my colleague and myself, I could not feel so sure of the absolute correctness of my own valuation, as to warrant me in refusing to yield in the direction of his strong convictions, within what I conceived to be the limits of my possible error, especially as I found him not unwilling, on his part, to give due weight to the like considerations.

I considered, moreover, the period which has elapsed even since the Treaty of July 1, 1863, during which the Claimants have been

unavoidably delayed in the receipt of their compensation, as properly bearing upon the amount now to be allowed. Upon these grounds I have concluded to unite in an award of Four hundred and Fifty Thousand Dollars in gold coin of the United States, to be paid according to the terms of the Treaty, as being the adequate money consideration mentioned in the Treaty for the transfer to the United States, of all the possessory rights and claims of the Hudson's Bay Company, under the third article.

It should be added, that our jurisdiction relating only to the third and fourth articles of the Treaty of Oregon, we have not considered, in any aspect the navigation claims of the Hudson's Bay Company, which are provided for in the second article.

Much that has been said in the discussion of the claims of the Hudson's Bay Company is also applicable to the consideration of those of the Puget's Sound Agricultural Company.

Upon the language of the fourth article, a question is raised, whether that Company is not bound to show a title anterior to the Treaty, valid in law against the Government of Great Britain. It is based upon the fact that the Treaty speaks of farms, lands, and other property "belonging" to the Company, and which it declares shall be confirmed to them.

The argument in favor of the construction of the Treaty which I have adopted in the Hudson's Bay Company's case, is broad enough to include this also, and to impose upon us, as a duty, the application of these terms of the treaty to the farms, lands, and other property at the time in the apparent ownership of the Puget's Sound Agricultural Company. There was never any grant of lands by the British Government to this Company, a fact in the knowledge of both Governments, and the construction contended for, would render the provision of the Treaty illusory.

If I may quote authority upon such a point, Vattel says:—(Law of Nations, Book 2, ch. 17, § 283). "We do not presume that sensible persons had nothing in view in treating together, or in forming any other serious agreement. The interpretation which renders a treaty null and without effect, cannot then be admitted. It ought to be interpreted in such a manner, as that it may have its effect, and not to be found vain and illusive. It is necessary to give the words that sense, which ought to be presumed most conformable to the intention of those who speak." In illustration of these principles,

he instances the case of the Athenians, who after having promised to retire from the territories of their enemy, remained in the country under the pretence, that the lands actually occupied by their army did not belong to the enemy. He rejects this interpretation in language more energetic than I wish to cite, and declares that by the territory of the enemy ought manifestly to have been understood, every thing comprehended in their ancient limits, without excepting what had been seized during the war.

Upon these principles of interpretation, I have no hesitation in saying that the intent of the parties, as manifested by the terms employed, included all the lands which apparently belonged to the Company. The term "belonging," is not a condition, and imports none into the provision. It is used merely as a part of the descriptive designation of the property intended.

A question is also presented, as to the extent of the possessions of the Company, and the outward indicia of property necessary to bring any particular lands within the terms of the Treaty.

It should not be forgotten that at the period when the Treaty was made, the possessions of the United States on the Pacific coast, were comparatively of trifling importance. California had not been acquired, gold had not been discovered, and the actual population of American citizens was very small. Apart from the occupation by the two Companies, whose claims are before us, most of the country was vacant. To require, under these circumstances, such evidence of appropriation and possession as are usual in settled countries, would be very unreasonable. In settled countries, such evidence is required, because enclosures and other like marks of ownership are the usual attendants upon proprietorship, and serve as notice to others who may have or claim conflicting rights. In this wilderness they would have been mainly useless for any purpose of enjoyment by the Company of their lands, and idle for any other purpose. It is enough if their lands were possessed in any sense, by such appropriation to the uses of the Company, as their circumstances called for. They had farms within enclosures, and they grazed their extensive herds of cattle over certain portions of the territory, near their main establishments, and included all these lands within what they regarded and used as their possessions before the Treaty.

I am satisfied, from the evidence, that their claims to lands both at Cowlitz and at Nisqually are not after-thoughts as to their

extent, but are substantially in accordance with the fact as it existed at the time of the Treaty. Two considerations strengthen me in this conclusion. The first is, that were their possessions so limited in extent as is claimed on behalf of the United States, they could not have been deemed, in the then condition of the country, of enough consequence to require a provision, looking to their becoming of public and political importance, and providing in that event, for their acquisition and purchase by the United States. It is only to a tract of country of considerable extent that such terms can have been thought applicable. This is not a mere power of eminent domain by which public necessity is provided for upon compensation made. It is political importance which was in view.

The next is, that the United States has never proceeded to confirm to this company any lands whatever, as they stipulated that they would. In the absence of such action on their part, I think it my duty to extend to the Company the benefit of any doubts which may possibly exist, as to the precise extent of their possessions at the time of the Treaty.

I find no evidence that this Company has ever voluntarily submitted to any dismemberment of its possessions; and though it has, in fact, been deprived of much the greater part of all its lands, I must consider its rights as standing unaffected by everything which has taken place since the date of the Treaty.

In considering the amount which ought to be paid by the United States, for the extinguishment of its claims, and the acquirement of its rights, I feel myself pressed upon by considerations of a like nature to those which I have mentioned in discussing the claims of the Hudson's Bay Company. The same diversity of testimony, and the same difference of views between myself and my colleague, as to questions of value, have existed in this case as in that, and the same process of reasoning and reflection have led me to unite with him in awarding to the Puget's Sound Agricultural Company, the sum of Two Hundred Thousand Dollars in gold, to be paid according to the terms of the Treaty, as the adequate money consideration for the transfer to the United States of all the possessory rights and claims of the Puget's Sound Agricultural Company, under the fourth article of the Treaty of Oregon.

In conclusion, I think it due to the distinguished gentlemen who as counsel have represented before us, the United States and the

Claimants, to express my deep sense of the service they have rendered to the Commissioners in the discharge of their duties. The thorough presentation of the case by evidence, and the full, able, and enlightened discussion of all the topics involved on either side, have greatly lightened our labors. And if the results at which we have arrived, shall prove not wholly unsatisfactory to the parties interested, we shall feel that it is in no small measure due to the assistance we have thus received.

ALEXANDER S. JOHNSON,

Commissioner on the part of the United States.

Washington, September 10th, 1869.

AWARD.

At a Meeting of the Commissioners under the Treaty of July 1st, 1863, between Her Britannic Majesty and the United States of America for the final settlement of the Claims of the Hudson's Bay and Puget Sound Agricultural Companies, held at the City of Washington, on the tenth day of September, 1869,

PRESENT :

JOHN ROSE, Commissioner on the part of Her Britannic Majesty,
ALEXANDER S. JOHNSON, Commissioner on the part of the United States of America.

The Commissioners having heard the allegations and proofs of the respective parties, and the arguments of their respective Counsel, and duly considered the same, do determine and award that, as the adequate money consideration for the transfer to the United States of America of all the possessory rights and claims of the Hudson's Bay Company, and of the Puget Sound Agricultural Company, under the first article of the Treaty of July 1st, 1863, and the third and fourth articles of the Treaty of June 15th, 1846, commonly called the Oregon Treaty, and in full satisfaction of all such rights and claims, there ought to be paid in gold coin of the United States of America, at the times, and in the manner provided by the fourth article of the Treaty of July 1st, 1863, on account of the possessory rights and claims of the Hudson's Bay Company Four Hundred and Fifty Thousand Dollars ; and on account of the possessory rights and claims of the Puget Sound Agricultural Company the sum of Two Hundred Thousand Dollars ; and that, at or before the time fixed for the first payment to be made in pursuance of the Treaty, and of this award, each of the said Companies do execute and deliver to the United States of America, a sufficient deed of transfer and release to the United States of America, substantially in the form hereunto annexed.

IN TESTIMONY WHEREOF, We, the said Commissioners, have set our hands to this award in duplicate, on the day and year, and at the place aforesaid.

(Signed,) JOHN ROSE,

(Signed,) ALEXANDER S. JOHNSON.

The same form of deed, *mutatis mutandis*, is to be executed by the Hudson's Bay Company.